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In the Matter of

Application by SBC Communications Inc.,
Southwestern Bell Telephone Company, And
Southwestern Bell Communications Services,
Inc., d/b/a Southwestern Bell Long Distance
For Provision of In-Region InterLATA
Services in Texas

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

The record in this proceeding is abundantly clear—Southwestern Bell Telephone Company (“SWBT” or “SBC”) simply has not taken all of the steps required by the Competition Checklist. As described by the Evaluation of the Department of Justice and other CLECs, SBC’s Application is fundamentally and fatally flawed in several respects. In particular, SBC simply does *not* provide competitors access to unbundled loops necessary for the provision of advanced services, such as xDSL.

I. SBC HAS NOT TAKEN ALL STEPS NECESSARY FOR THE COMMISSION TO EVALUATE FULLY CHECKLIST COMPLIANCE

If there is nothing else clearer from CLEC comments, SBC’s 2000 pages of *ex parte* presentations, and the DOJ Evaluation, it is that SBC’s January 10 application was patently deficient in proving SBC’s compliance with the checklist. In particular, based upon the clear record in the case—the “fundamentally flawed” DSL performance metrics discussed by the DOJ and the evidence of actual discrimination revealed by the data in

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the record—SWBT has not proven that it is currently providing nondiscriminatory access to unbundled, xDSL-capable loops.

The FCC and the Texas PUC have articulated several steps that SWBT must take that—if faithfully implemented—would bring SWBT into compliance with regard to xDSL-capable loops. These steps are clearly laid out in the *UNE Remand Order*, the SBC-Ameritech Merger Conditions, the *Line Sharing Order*, the Texas DSL Arbitration Award and related dockets, and the Texas 271 Investigation Docket.¹ The overriding fact the Commission must remember is that SBC is, at best, mid-stream in implementing these steps, and to grant 271 authority prior to full implementation is patently inconsistent with Commission precedent and the purpose of the Telecommunications Act of 1996.

To be consistent with precedent and the goals of the 1996 Act, the Commission cannot rely upon “paper promises” and future commitments. The *Second BellSouth Louisiana Order* clearly stated that a BOC “must demonstrate that it has a *concrete and specific legal obligation* to furnish the item upon request pursuant to a state-approved interconnection agreement.”² In the *Second Ameritech Michigan Order*, the Commission stated that “a BOC’s promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the

¹ The attached Reply Declaration of Chris Goodpastor provides an updated list of several important legal milestones and deadlines associated with those orders, and discusses the status of SBC’s implementation of those milestones and deadlines.

² *Second BellSouth Louisiana Order* at ¶ 54 (emphasis added).

requirements of section 271.”³ Section 271 cannot be met with “prospective evidence that is contingent upon future behavior.”⁴

As pointed out by Rhythms and Sprint, an effective interconnection agreement containing *all* relevant DSL issues is a factual predicate to this application.⁵ The attached Goodpastor Reply indicates that Covad only executed and filed a complete interconnection agreement with SWBT last Friday, February 18, 2000—and even this agreement is incomplete, because it fails to implement line sharing and agrees to an implementation schedule for necessary OSS, process improvements and final prices. Covad and other CLECs simply have absolutely *no* commercial experience with SBC’s performance in the significantly-altered DSL legal regime that has been ushered in by these FCC and Texas Commission decisions. Therefore, this Application must rise or fall based on SBC’s promises to implement the relevant legal orders and its commitments.

The problem with unenforceable commitments is that they can be changed or altered on a whim. Nowhere is the precarious nature of SBC’s unenforceable “commitments” more demonstrable than a December 17, 1999 letter from SBC to the Texas Commission. On that date, SBC informed the Commission that if its 271 Application were rejected, CLECs that had opted into the T2A would have their

³ *Second Ameritech Michigan Order* at ¶ 55.

⁴ *Id.*

⁵ Rhythms correctly points out that SBC’s Application cannot present a single, approved interconnection agreement that provides xDSL-capable loops pursuant to law. Rhythms Comments at 8-9, 13. Sprint points out that the “T2A” Attachment 25 relied upon by SBC in its application for xDSL-capable loop compliance contains no obligation for SBC to dismantle its Selective Feeder Separation system, various changes in the DSL loop ordering process, provide actual loop makeup information, such as actual loop length, LFACs and LEAD access. Sprint Comments at 36-39, n.29. Indeed, the T2A DSL Attachment at § 8.1 *specifically reserves* SBC’s right to assign CLEC loops pursuant to the discriminatory SFS method. Sprint Comments at 4, 36, Rhythms Comments at 9 n.28.

interconnection agreements terminated on April 20, 2000. But if SBC's 271 application is successful before the FCC, those CLECs would enjoy an extension of their agreements until October 13, 2003.⁶ If the Commission is searching for "shakedowns", it need look no further. SBC is holding the substantive legal and contractual rights of new CLECs—companies perhaps trying to raise capital to execute a new and innovative business plan—hostage to its Section 271 efforts. That is a long way from a "concrete and specific legal obligation" required by Commission precedent.

There is a better way—full implementation of rules and decisions by the FCC and the Texas Commission. These steps include, but are not limited to:

- Deployment of a real-time, electronic access to loop makeup information on May 30, 2000 in a manner that will fix the current discriminatory, superior access which SBC's retail personnel (including the advanced services affiliate) enjoy today;⁷
- Full Implementation of the DSL line sharing UNE;⁸
- Full implementation of the changes required by the *UNE Remand Order* and the DSL Arbitrations;⁹
- A specific demonstration that SBC has eliminated all elements of Selective Feeder Separation (SFS) and binder group management systems;¹⁰

⁶ Letter from James B. Shelly, SWBT, to Chairman Pat Wood III, Commissioner Judy Walsh, and Commissioner Brett Perlman, dated Dec. 17, 1999.

⁷ As discussed by Covad and Rhythms, the DSL Arbitrations uncovered several examples of *actual* discriminatory access. For instance, SBC retail personnel have access to several competitively-significant categories of loop makeup information that CLECs have no access, including: (1) location and types of repeaters; (2) existence of spare loops; (3) number of lines in use at customer premises; (4) location of cable plant; (5) capacitance; (6) type of load coil; (7) number of points of loading; (8) number of bridged taps; and (9) number of repeaters. Rhythms Comments at 23-24. In addition, SBC's retail ADSL operations have a single unified ordering system that operates from prequalification through the ordering process—CLECs have no comparable system. Rhythms Comments at 24-26.

⁸ Covad agrees that SBC needs to make a "concrete and detailed showing" as to how it will meet the June 9, 2000 deadline for line sharing. Rhythms Comments at 43-44; *see also* Sprint Comments at 57-59.

⁹ Because T2A DSL Attachment does not contain these terms, Covad agrees with Sprint's observation that the T2A "is incomplete at best" and is "inconsistent with federal law." Sprint at 40.

- Implementation of acceptance testing on all loops (a process that will assist in collecting xDSL-capable loop installation data);¹¹
- Implementation of the improvements to DSL loop preordering and ordering OSS as required by the *UNE Remand Order*, the Texas DSL Arbitrations, and as “promised” by SBC in December 1999, and provide a showing that those modifications have improved performance;
- Modification and implementation of an appropriate DSL Performance Measurements and Performance Plan as per DSL Arbitration Award, established with CLEC input that also will involve continuous, consistent and rigorous reconciliation of actual raw data;¹²
- Full operational implementation of the Advanced Services affiliate, pursuant to suggestions made by the DOJ and Covad in this proceeding.

Only *after* these steps are taken can the Commission actually begin to examine whether SBC is providing nondiscriminatory access to unbundled xDSL-capable loops.

II. COMMENTS IN THIS PROCEEDING CLEARLY SHOW THAT SBC HAS NOT MET CHECKLIST ITEMS (ii) AND (iv)

A. The DOJ Evaluation

The Department of Justice Evaluation got it right: SWBT has “not demonstrated that it is providing nondiscriminatory treatment to competitors offering xDSL services.”¹³

¹⁰ There is considerable doubt as to whether this has in fact happened. Rhythms points to an SBC document circulated on January 19, 2000 which indicates that date, SBC had not dismantled the system. Rhythms Comments n.38, Att. 13; *see also* Note 5, *supra* (SFS still in DSL Attachment to T2A).

¹¹ Although SBC finally “committed” to offer acceptance testing on December 16, 1999 (months after Covad proposed the process), SBC then took the position that it did not have to actually do those tests until a comprehensive interconnection agreement was entered into and effective. As described in the Goodpastor Reply Declaration, Covad’s final interconnection agreement with SWBT, which provides for acceptance testing, was finally submitted only last Friday, February 18, 2000. Goodpastor Reply Decl. ¶ 4.

¹² The DOJ found that the current performance remedy play was inadequate for data CLECs because “DSL performance measures associated with the CLECs’ interconnection agreement have yet to be defined.” DOJ Eval at n.67. That process only began yesterday. *See* Goodpastor Reply Decl. ¶ 4.

¹³ DOJ Eval. at 2.

The DOJ comprehensively reviewed SWBT's application under the clear standards articulated by the Commission the *Bell Atlantic New York Order*¹⁴ and affirmatively found that SBC "cannot satisfy" those standards.¹⁵

The DOJ's evaluation of the facts confirms the comments of CLECs in this proceeding and uncovers even more startling revelations. For instance—

- SBC admitted to DOJ that its Firm Order Commitment (FOCs) measurements (PMs 5, 6) do not evaluate DSL loop orders by CLECs.¹⁶ As a result, there are simply *no* performance measurements that track the DSL loop ordering process.¹⁷
- Evaluation of SBC's PM 55.1 (DSL Loop Installation) is "fundamentally flawed" because of a "processing error", SBC's failure to provide carrier-specific reports to data CLECs,¹⁸ and the lack of acceptance testing "cloud[s]" this measurement.¹⁹
- SBC's loop qualification (PM 57) data is faulty, and Covad and other CLEC experience is much worse than SBC claims;²⁰

¹⁴ A standard the Texas PUC did *not* apply in its comments in this proceeding.

¹⁵ DOJ Eval. at 11.

¹⁶ DOJ Eval. at 14; DOJ Exh. 3.

¹⁷ SBC's failure to evaluate DSL loops in its FOC performance measurements (PMs 5, 6) renders SBC's "installation" metrics for DSL loops highly suspect. Invariably, the Business Rules for the various performance measurements for installations (*e.g.*, PMs 55.1, 58, 60) consider the FOC date as the "due date". However, if the FOC is already four or five late, installation on the promised "late due date" is still a "late" installation from the CLEC perspective, but the PMs will show that loop as delivered on time.

¹⁸ Covad was able to obtain its own carrier-specific data on January 25, 2000—only after seeking intervention from the Texas PUC. This data was attached to Covad's Comments, Wall Decl., Exhibit MW-3. This carrier-specific report does contain some data for this metric, so Covad seems to have escaped SBC's "processing error." However, the Wall Decl. finds that PM 55.1 only tracks 51% of Covad's actual received orders.

¹⁹ DOJ Eval. at 15-17. SBC's errors with this measurement has prevented the Texas Commission from providing a complete evaluation. In particular, the Texas Commission noted that it "was concerned" about the results of PM 55.1, but also noted that "there are not many data points" with regard to PM 55.1. TX Eval. at 64. If SBC had included NorthPoint's DSL loop orders and nearly half of Covad's DSL loop orders in this measure, the Texas Commission would have had a more comprehensive picture.

²⁰ DOJ Eval. at 13.

The DOJ concluded the faults with these DSL-related performance measurements “*substantially undermine*” SBC’s claims in this proceeding because those measurements relate to “*several competitively important dimensions of SBC’s DSL performance.*”²¹

Despite these “fundamental flaw[s]”, the DOJ pointed out several areas where *even SBC’s faulty data* shows discrimination. The DOJ found evidence of discrimination in SBC’s February 1 *ex parte* presentation on no fewer than *nine* DSL-related performance measurements.²² The DOJ found that SBC’s own data shows a continued *decline* in the quality of service to data CLECs, a fact confirmed by Covad’s actual and documented experience in Texas.

The DOJ concluded that data CLECs like Covad are “seriously disadvantaged” by SBC’s “inadequate wholesale performance” in Texas:

Taken as a whole, these performance reports show a service environment in which CLECs attempting to compete against SBC’s retail DSL services are seriously disadvantaged at present by SBC’s inadequate wholesale performance, and may well face greater disadvantages in the future if SBC’s performance continues to decline in the face of higher volumes of CLEC orders.²³

No amount of spin can avoid the real facts—data CLECs face a discriminatory service environment in Texas.

B. The Texas Commission Evaluation

Although the Texas Commission recommended approval of SBC’s Application, a close review of the Texas Commission’s “verification” of the xDSL-capable loop requirements reveal several areas in which SBC appears to have misled the Texas

²¹ DOJ Eval at 17 (emphasis added).

²² See SBC Feb. 1, 2000 *ex parte*, PMs 55.1, 56, 58, 59, 60, 62, 65 and 67. Covad discusses its evaluation of these measurements in Section II.D below.

²³ DOJ Eval at 23.

Commission as to its actual performance. In addition, the Texas Commission did not seem to review SBC's performance with regard to "2-Wire Digital" (BRI ISDN Loops), which are used by Covad and other DSL CLECs to provide advanced, xDSL services.

It appears that the Texas Commission may have been misled by SBC's "fundamentally flawed" performance reports. Other than one effort in November 1999 to collect and reconcile data regarding the DSL loop ordering process (which, according to the Texas Commission, "raised concerns"),²⁴ the Texas Commission has not collected further performance data directly from CLECs, unlike the New York Commission in the Bell Atlantic 271 process.²⁵

This omission is important, because this proceeding has revealed significant data collection problems with regard to DSL loops. For instance, the Texas Commission was apparently denied the ability to undertake a comprehensive review of PMs 55.1 because of SBC's data collection failures.²⁶ Reconciliation of SBC and CLEC data would help determine SBC's actual performance on this metric. But despite CLEC willingness,²⁷ neither the Texas Commission nor SBC has undertaken that reconciliation process.²⁸

²⁴ TX Eval at 63.

²⁵ As NorthPoint points out, prior to Bell Atlantic's New York application, the New York Public Service Commission received daily reports of loop performance from Bell Atlantic and DSL CLECs. NorthPoint Comments at 1.

²⁶ See Note 19, *supra*.

²⁷ See NorthPoint Comments at 3

²⁸ The Texas Commission's evaluation of PM 57 is also clouded by SBC's failure to implement a necessary business rule change for several months. SBC admitted to the DOJ that its February 1 *ex parte* still calculates the incorrect interval for PM 57. DOJ Eval. at 12-13. As the result, the DOJ stated that "the Texas PUC apparently relied upon the faulty data" in its evaluation of SBC's performance under this metric. DOJ Eval. at 13; *see also* NorthPoint Comments at 11-12. SBC "committed" to change the manner it calculated PM 57 on December 16, 1999, at the same time it also committed to dismantle SFS and several changes to the DSL loop ordering process. See Chapman Aff. ¶ 6; 12/16/99 Open Meeting Tr. at

In addition, the performance data filed by SBC in its February 1, 2000 *ex parte*—the day *after* the Texas Commission’s Evaluation was filed at the FCC—undermine the Texas Commission’s conclusions. For instance, the Texas Commission’s evaluation of PM 58 (% SWBT Caused Missed Due Dates)—a measure the DOJ calls “one of the most significant measures for DSL provisioning”—is directly contradicted by SBC’s February 1 filing. The Texas Commission stated that SBC’s performance on PM 58 has “steadily improved,”²⁹ but the December 1999 data filed on February 1 showed a significant degradation in performance for both BRI ISDN and DSL loops in December 1999.³⁰

Finally, the Texas Commission’s evaluation of SBC’s xDSL-capable loop performance did not examine SBC’s provisioning of BRI ISDN loops (called “2-wire Digital Loops” in the T2A and other SBC Interconnection Agreements) to CLECs.³¹ BRI ISDN loops, used by DSL CLECs to provide “IDSL” service, are clearly important to the provision of advanced services and must be part of the xDSL-capable loop showing.³² This Texas Commission’s omission is particularly important, because SBC has a different ordering and provisioning process for these loops, SBC tracks its

14-15. SBC’s failure to implement its “commitment” to change PM 57 calls into question SBC’s implementation of the other changes it “committed” to on that date.

²⁹ TX Eval. at 65.

³⁰ The degradation was particularly acute for BRI ISDN loops—SBC delivered no fewer than 23.3% of CLEC BRI ISDN loops late in December 1999, according to SBC’s own data, compared to 15.5% in November 1999. SBC performance for “DSL Loops” in December 1999 also worsened. Even SBC’s own data shows that for DSL Loops, this metric has never been in parity.

³¹ The “DSL Capable Loops” section of the T2A Attachment 25 includes IDSL in its definition of “DSL”, defines the term “2-wire Digital Loops” by reference to BRI ISDN standards, and provides rates, terms and conditions for this type of loops. See T2A Attachment, §§ 2.3, 4.1.1, 4.1.2, 4.1.2.5, and 11.

³² As made clear by the DOJ, DSL CLECs currently order BRI ISDN loops to support a particular form of xDSL service, IDSL. DOJ Eval at 17. NorthPoint also tried to provision SDSL service over BRI ISDN loops, and Telcordia “tested” two such loops.

performance on these loops with different reports, and the DOJ found that these reports show substantial discrimination in SBC's provisioning of BRI ISDN loops to CLECs.³³

As Covad and other CLECs stressed in opening comments, the Texas Commission has done admirable and painstaking work to open up Texas to competition. It is hard to imagine, but only a little over a year ago, data CLECs could not operate in Texas, because SBC restricted uses of loops to its preferred ADSL services and imposed anticompetitive collocation practices.³⁴ In addition, only a couple of years ago, the FCC had to preempt several portions of the Texas telecommunications statute that erected explicit barriers to entry throughout the state.³⁵

Against this legal backdrop of overt hostility to entry, the Texas Commission has worked hard in to establish a pro-competitive environment for advanced services in the state. However, the way to affirm the Texas Commission's leadership role in fostering a pro-competitive, advanced services environment is not to approve this application prematurely, but to insist upon full and demonstrated implementation of these pro-competitive decisions.

C. Comments by Other CLECs

Other CLECs presented data and arguments that bolster the position that SBC has not made the required showing of nondiscriminatory access to xDSL-capable loops.

³³ DOJ Eval. at 21-23.

³⁴ See Rhythms Comments at 5-13, 54-59 for a full discussion of one data CLEC's efforts to enter Texas and the barriers thrown up by SBC. Covad's entry into Texas roughly parallels Rhythms, although Covad began the process in May 1998 and SBC initially tried to keep Covad out of the Section 271 Investigation and collaborative process.

³⁵ See In the Matter of the Public Utility Commission of Texas, *et al*, CCB Pol 96-13, 96-14, 96-19, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order*, 13 FCC Rcd 3460 (1997).

SBC's Performance Shows Demonstrable Discrimination. In Opening

Comments, Covad provided substantial information with regard to SBC's provisioning of unbundled xDSL-capable loops. Other DSL CLECs report comparable poor performance. In particular, more than half of NorthPoint's orders are delivered late or with unnecessary problems. NorthPoint also experiences frequent rejections of its orders, and unilateral changes in FOC dates by SBC.³⁶ Rhythms said that approximately 80% of its orders are initially rejected by SBC's unnecessarily complex and discriminatory DSL loop ordering system.³⁷ Rhythms pointed out that CLECs are forced to endure dysfunctional xDSL-loop ordering system while SBC's retail ADSL services have a single, unified electronic preordering and ordering system.³⁸

The Telcordia "Test" has No Probative Value regarding xDSL Processes.

CLECs agree that Telcordia's "test" of a grand total of two ADSL and two BRI ISDN loops was patently insufficient to determine whether SBC's xDSL loop OSS are nondiscriminatory.³⁹ The Comments of NorthPoint are particularly probative with regard to the Telcordia Report, because NorthPoint was the DSL CLEC Telcordia used in its review. NorthPoint said that Telcordia examined "only the most cursory information"

³⁶ NorthPoint Comments at 14-16; Northpoint Lewandowski Aff. ¶¶ 7, 24-31. Of course, when SBC changes a FOC date, several "installation" measurements (e.g., PM 58) become skewed.

³⁷ Rhythms Comments at 31; Rhythms Lopez-Baros Aff. at 12; *see also* NorthPoint Comments at 18: "The hodgepodge of systems, interfaces, faxes, emails and handwritten notes that constitute the current ordering process will, and frequently do, fail."

³⁸ Rhythms Comments at 24-26.

³⁹ Sprint Comments at 32-33 (Telcordia test "unreliable" regarding xDSL); Rhythms Comments at 38-43 (describing Telcordia test as "completely inadequate"); *see also* DOJ Eval. n.18 (Telcordia Final Report suggests that further study of DSL necessary as a "next step"); TX Eval. at 7 (Telcordia Report did not examine "a large number of data points relating to xDSL").

that included “no real world experiences.”⁴⁰ NorthPoint argued that the Telcordia Report should not be relied upon with regard to xDSL because it only considers a “handful of phantom loop orders.”⁴¹

SBC does not Deserve any “Nascent” Service Exception. In the *Bell Atlantic New York Order*, the Commission clearly stated that it would not consider any more “unique” or “special circumstances” exceptions to the xDSL-capable loop showing.⁴² That said, Covad and others remain concerned that SBC may be teeing up such an argument, especially since SBC cannot prove actual nondiscriminatory performance in Texas.

SBC’s deplorable and sanctionable conduct in the DSL Arbitrations speaks for itself.⁴³ Covad agrees with Sprint that the “primary cause” for the current level of DSL entry in Texas is SBC’s delay.⁴⁴ As Rhythms stated: “Sadly, nowhere in the country have data CLECs providing DSL services had to fight harder for less than in Texas.”⁴⁵

D. SBC’s February 1, 2000 *Ex Parte* Submission

Recognizing the obvious faults in its initial Application, SBC has already filed over 2000 pages of *ex parte* presentations in this proceeding. Covad feels compelled in this Reply to respond to SBC’s late-filed February 1, 2000 *ex parte* performance

⁴⁰ NorthPoint Comments at 1.

⁴¹ *Id.* at 2.

⁴² *Bell Atlantic New York Order* at ¶¶ 308, 330.

⁴³ As Sprint pointed out: “Even while pursuing its Section 271 approval at the state level, SWBT attempted to avoid complying with the law wherever possible. Its successful delay of xDSL competition speaks volumes about SWBT’s approach.” Sprint Comments at 8.

⁴⁴ Sprint Comments at 44-49; *see also* NorthPoint Comments at n.22.

⁴⁵ Rhythms Comments at i.

measurement report.⁴⁶ This report shows considerable problems with SBC's performance that fundamentally undermines SBC's Application.⁴⁷

Average FOC Response Time-Manual Loop UNE (PM 6-17) shows that the average response time for a FOC jumped to 42.9 hours in December 1999—well above the 24 hour benchmark.

Although the data for **Average Installation Interval-DSL (PM 55.1)** is flawed, even SBC's data shows that CLECs receive inferior quality service, such as an average of four additional days to condition a loop. Covad's initial comments stated that nearly one-half of Covad's orders have been omitted for this metric through December 1999. SBC has not identified to Covad the loops it has included in this metric;⁴⁸ thus, it is impossible for Covad to reconcile this data.

SBC's performance on **Percent SWBT-Caused Missed Due Dates (PM 58)** shows significant deterioration in December 1999. For BRI ISDN loops, SBC reportedly failed 23.3% of the time, up from 15.5% in November 1999. For DSL loops, SBC's reported performance deteriorated considerably in December 1999 as well, and this measure has never been at parity.⁴⁹

⁴⁶ Although the data was available to SBC on January 20, 2000, SBC chose until the day *after* comments were due by Covad and other interested parties to file this data with the Commission.

⁴⁷ In providing these comments, Covad does not waive its rights to seek to strike this and other late-filed data filed by SBC. As Covad discussed in its Opening Comments, SBC's Application (particularly, the Dysart Affidavit) failed to disclose relevant performance data that was in its possession at the time the Application was filed. In a proceeding where Covad and other interested parties had only three weeks to review and provide comment on the Application, SBC's omission of obviously relevant performance data has severely prejudiced the ability of interested parties to provide meaningful comment on the Application.

⁴⁸ See DOJ Eval. at 16.

⁴⁹ Since SBC admitted to the DOJ that its FOC measurements do not take into account DSL loop ordering procedures, the Commission must recall that the "due date" used for this and other metrics for DSL loops are already skewed well in SBC's favor.

Percent Trouble within 30 Days (PM 59) also “deteriorated badly as volumes increased in December.”⁵⁰ One in five BRI ISDN loops provided to CLECs now experience a trouble in the first month of service, as do nearly one in six DSL loops. Interestingly, SBC’s retail performance has been very consistent (and far superior than service to CLECs), while performance to CLECs has decreased remarkably.

SBC performance on **Missed Due Dates due to Lack of Facilities (PM 60)** has also gotten worse for CLECs. In December 1999, a CLEC was *fifteen* times more likely to have its BRI ISDN loop order delayed because of a “facilities” issue than SBC’s retail service. In November 1999, CLECs were “only” five times more likely to experience these delays.⁵¹ For DSL loops, CLECs were *eleven* times more likely to face a facilities issue than SBC’s retail analogue, considerably worse than in November 1999.

The **Trouble Report Rate (PM 65)** has also gotten worse for CLECs in Texas. Indeed, for BRI ISDN loops, this measure skyrocketed to 19.3% in December 1999, up from 9.1% in November 1999. SBC’s performance to itself remained consistent in those two months, 2.4% and 2.5% respectively. Since October 1999—commensurate with the ramp up of DSL services in the state by DSL CLECs such as Covad, Rhythms and NorthPoint—SBC has not provided parity service. The data clearly shows that while SBC’s retail performance has remained fairly consistent (below 3.0%), wholesale performance to CLECs is deteriorating at an alarming rate as volumes increase.

⁵⁰ DOJ Eval. at 20.

⁵¹ The DOJ observed that this problem has “worsened significantly as the number of circuits increased in December.” DOJ Eval. at 22.

In the end, to the extent the Commission believes it can rely on SBC's performance data—a result the DOJ, Covad and other CLECs strongly dispute⁵²—it must agree with the DOJ that DSL CLECs are seriously disadvantaged in Texas.⁵³

III. SEPARATE AFFILIATE CONSIDERATIONS

The Department of Justice and other CLECs agree that SBC cannot rely upon the “separate affiliate” method of proving compliance with Checklist Item (iv) for a very straightforward reason—the affiliate is not yet “fully operational” and therefore no evidence exists to show that CLECs are receiving nondiscriminatory treatment.

No Evidence of Nondiscriminatory Treatment of Affiliate. Simply establishing a separate affiliate *cannot* be the sole test for compliance with this checklist item. The DOJ stressed that “meaningful, reliable and reproducible performance measures” must be in place in order for the Commission and CLECs to detect whether the affiliate is *in fact* receiving the same treatment as other CLECs.⁵⁴ The DOJ said that a “concrete demonstration of nondiscrimination, rather than an abstract promise” is what is required to show that the affiliate structure will help prevent discrimination.⁵⁵ The current performance measurements simply do not track DSL wholesale performance in a

⁵² NorthPoint says that “any conclusions based on SWBT’s accumulation of DSL-specific performance data cannot be trusted, for those data are wrong.” NorthPoint Comments at 9.

⁵³ The DOJ Evaluation of SBC’s performance should carry more weight than the Texas Commission’s evaluation not only because of the “substantial weight” standard but because the Texas Commission did not evaluate SBC’s BRI ISDN loop performance in its xDSL-capable loop review.

⁵⁴ DOJ Eval at 25-26. The DOJ also stressed the need for a rigorous examination of the actual relationship between the BOC and its affiliate “to ensure that the affiliate’s relationship to the BOC is the same in *all relevant respects* as the BOC-CLEC relationship.” *Id.* at 25. In opening comments, Covad provided several suggestions for such an affiliate, including separate shareholder bases, no joint marketing, no sharing of personnel, the requirement of a comprehensive interconnection agreement, etc.

⁵⁵ DOJ Eval. at 26. “SWBT cannot launder the SBC/Ameritech separate affiliate to make it applicable to Section 271 simply by citing to the Commission’s *New York Order*.” Sprint at 43-44.

meaningful way. Without complete, effective and comparative performance measurements, the existence of a separate affiliate is meaningless.

ASI's Ownership of Collocated DSL Equipment at Remote Terminals Uncertain.

Further evidence that SBC is a long way from making ASI fully operational arose last week. SBC requested the Commission to waive a portion of the SBC/Ameritech Merger Conditions in order to permit its ILEC operation to purchase and operate certain DSL and remote terminal equipment.⁵⁶ In short, SBC has not resolved the relationship between its affiliate and its ILEC operation with regard to its planned \$6 billion investment in "Project Pronto." Since SBC does not even know what DSL equipment ASI will or will not own, it would seem to be impossible to find that ASI is even close to operational.

The Affiliate Cannot Remedy Current Discrimination. Data CLECs are currently receiving discriminatory treatment and simply creating a separate affiliate cannot solve that problem. The DOJ points out that "current discrimination could be ended *only by improving the quality of performance provided to the CLECs.*"⁵⁷ Unless one accepts the counterintuitive belief that SBC intends to degrade the service it provides to its retail DSL customers by creating the separate affiliate, creation of an affiliate alone cannot be expected to remedy the actual documented problems.⁵⁸

The Affiliate Must be Structured to Ensure Apples-to-Apples Comparisons. For the "Separate Affiliate Presumption" to have any meaning, the separate affiliate must be

⁵⁶ Public Notice, *Common Carrier Bureau Seeks Comment on SBC's Request for Interpretation, Waiver, or Modification of the SBC/Ameritech Merger Conditions*, CC Docket No. 98-141, DA 00-335, rel. Feb. 18, 2000; Letter from Paul K. Mancini, Vice President & Assistant General Counsel, SBC Communications, Inc. to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC (Feb. 15, 2000).

⁵⁷ DOJ Eval at 26-27.

⁵⁸ Rhythms Comments at 47-48.

the sole retail outlet for the *full range* of wholesale services and elements that data CLECs order, not just a few. For example, the Commission cannot utilize the separate affiliate structure to presume that the provision of unbundled BRI ISDN loops to CLECs if the separate affiliate does not provide retail ISDN services.

It appears that SBC may only intend to utilize the separate affiliate to provide ADSL services by means of line sharing.⁵⁹ Since SBC has yet to implement the Commission's line sharing requirement, SBC's performance to the affiliate could not be used by the Commission to presume that SBC is providing nondiscriminatory access to stand-alone loops (utilized by Covad and other CLECs for SDSL).⁶⁰

This issue would be partially addressed if the Commission took Covad's suggestion the separate affiliate be the sole retail provider of all DSL, ISDN, T1, frame relay and other hi-cap services.⁶¹ The DOJ and Covad provided comments as to how the Commission should apply the "separate affiliate presumption" in 271 Applications, and Covad suggests that the Commission take the opportunity in this proceeding to clearly spell out this avenue of proof.⁶²

⁵⁹ SBC has not entered into a detailed interconnection agreement with its affiliate that describes how it will actually provide line sharing to that affiliate. *See, e.g.,* NorthPoint Comments at 6-7, n.17.

⁶⁰ One of the reasons the Commission ordered line sharing was because the operational difficulties in providing stand-alone loops were adversely affecting the ability of data CLECs to compete.

⁶¹ This change could be accomplished by modifying the definition of Advanced Services in the SBC/Ameritech Merger Conditions (Paragraph 2) to read as follows:

the term "Advanced Services" means intrastate or interstate wireline telecommunications services, such as ADSL, IDSL, xDSL, Frame Relay, Cell Relay, T1, DS3, OCx, ATM, VPOP-Dial Access Service (an SBC Frame Relay-based service), MVL, ISDN, x.25-based, x.75-based, and any other service that relies on packetized technology and have the capability of supporting transmissions speeds of at least 56 kilobits per second in both directions.

⁶² The Commission is not limited to the structural separation requirements of the SBC/Ameritech Merger Conditions. As pointed out by Rhythms, to the extent SBC seeks to provide interLATA advanced services, it must create an "independent[]" Section 272 affiliate. Rhythms Comments at 60-64. As pointed

IV. OTHER ISSUES RAISED BY COMMENTERS

Covad agrees with many other points raised by several commenters.

A. Application of Public Interest Analysis to Advanced Services

Covad agrees with Rhythms and Sprint that consideration of advanced services should be included in the Commission's public interest analysis.⁶³ In particular, the Commission needs to take into account SBC's intransigence and stonewalling tactics in Texas as part of its review of this Application. These tactics are a calculated effort by SBC to utilize its market power and control of bottleneck facilities (access to collocation, loops, and interoffice transport) in order to delay DSL deployment by CLECs.⁶⁴

In prior 271 decisions, the Commission has stated that its public interest review will be influenced by "evidence that a BOC applicant has engaged in discrimination or other anticompetitive conduct."⁶⁵ In Texas, SBC has clearly "engaged in a pattern of discriminatory conduct" and has routinely disobeyed federal and state telecommunications regulations.⁶⁶ Indeed, the litany of anticompetitive acts in Texas is long and well documented and includes SBC (1) providing superior access to loop makeup information and other OSS to retail ADSL operations; (2) sharing confidential CLEC collocation data with retail ADSL operations; (3) engaging in sanctionable discovery abuses in the DSL Arbitrations; (4) engaging in actions as part of SBC's

out by Sprint, the SBC/Ameritech Merger Order specifically states that the SBC/Ameritech conditions "are in no way intended to define" what is required by Sections 251 or 271. Sprint Comments at 70, quoting *SBC/Ameritech Merger Order* at ¶ 511.

⁶³ Rhythms Comments at 54-60; Sprint Comments at 72, 83-86.

⁶⁴ *Accord* Rhythms Comments at ii, 54-60.

⁶⁵ *Second Ameritech Michigan Order* at ¶ 397.

⁶⁶ *Id.*

merger with Southern New England Telephone company that were inconsistent with Sections 271 and 272 which ultimately resulted in SBC paying \$1 million to the U.S. Treasury;⁶⁷ and (5) litigating, in the words of a Texas Federal District Court Judge, “every single obviously non-meritorious point” in an interconnection arbitration appeal.⁶⁸

This actual behavior is highly relevant to the public interest analysis. In addition, the Commission must consider the impact that granting (or denying) this Application would have upon the incentive of other incumbent LECs to engage in similar activity.

B. Section 272 Compliance regarding inter LATA Advanced Services

Rhythms raises an important point that to the extent SBC’s retail xDSL services will cross LATA lines, the provision of those interLATA services must be made through a Section 272 separate subsidiary that “operates independently” from the BOC.⁶⁹ The relationship between this necessary Section 272 affiliate and SBC’s promised “advanced services affiliate” has not been fully explored by SBC. What is clear is that the separate advanced services affiliate does not meet the Section 272 separation requirements.⁷⁰

In the *Bell Atlantic New York Order*, the Commission has found that “the best indicator” of future compliance with section 272 is “past and present behavior of the BOC applicant.”⁷¹ The cornucopia of anticompetitive listed in Section IV.A above and in

⁶⁷ *SBC Communications Inc.*, FCC 99-153 (rel. June 28, 1999).

⁶⁸ *Southwestern Bell v. AT&T Communications of the Southwest*, No. A97-CA-132 SS, 1998 U.S. Dist. LEXIS 15637 at *56-57 (W.D. Tex. Aug. 31, 1998); *quoted in Sprint Comments n.73*.

⁶⁹ Rhythms Comments at 60-64.

⁷⁰ Rhythms Comments at 62-63. For example, the merger conditions permit joint marketing, sharing of personnel, and superior access to loop and customer data between ASI and SWBT, while Section 272 prohibits such activities.

⁷¹ *Bell Atlantic New York Order* at ¶ 402.

party comments shows that the Commission cannot trust SBC's assurances that its affiliate will "operate independently."⁷²

C. Importance of EDI Interfaces to Advanced Services

Other CLECs have raised significant issues with regard to SBC's OSS that also implicate the provision of advanced services. The CLEC Coalition, ALTS, MCI and Sprint focus upon significant problems with SWBT's EDI "change management process" and other OSS problems. As Covad migrates to an EDI platform for xDSL-capable loops, these EDI implementation issues, including change management, will become very important to Covad's ability to provide advanced services in Texas. As a result, the Commission needs to examine these issues very closely in order to ensure that advanced advance services providers receive nondiscriminatory treatment.

V. CONCLUSION: SAYING YES TO SAYING NO

This proceeding is absolutely critical in ensuring that BOCs completely address xDSL-capable loop issues in their Section 271 efforts. A firm and resounding "No" in this case would crystalize the Commission's resolve in the eyes of all BOCs as to the importance of advanced services and would have a tremendous, pro-competitive effects throughout the country.

Rather than implement the steps that would lay the foundation for meeting the *Bell Atlantic New York Order* test, SBC instead undertook a massive snow job. SBC's original Application claims to provide nondiscriminatory access through October 1999—but SBC has since trickled out data for November and December 1999 that contradicts

⁷² Rhythms Comments at 63-64 ("SBC's actions are not those of a company that has internalized the letter or the spirit of the market opening provisions of the Telecommunications Act. In short, there is ample evidence to support a conclusion that SBC would be unlikely to voluntarily comply with the provisions of Section 272.").

this position. SBC hides raw data from CLEC review, making a reconciliation of performance data impossible for this Commission to undertake. SBC has not implemented line sharing. SBC has not figured out what DSL equipment its separate affiliate can and cannot own. SBC has not made necessary changes to its OSS to support xDSL-capable loop preordering and ordering—despite currently-effective FCC and Texas Commission orders mandating such changes. SBC has not implemented changes to its systems (e.g., PM 57) despite its “commitment” to do so last year.

The Department of Justice—whose analysis the Commission is required by law to give “substantial weight” in this proceeding—found unequivocally that “[i]n the critical area of providing unbundled loops for advanced services”, the Application “is clearly deficient.”⁷³ The DOJ concluded that “SBC has failed to establish that it is providing, or will provide, nondiscriminatory access to unbundled loops for DSL services.”⁷⁴

The Department of Justice saw through the blizzard of SBC’s 2000 pages of post-Application evidence, fundamentally flawed data measurements, and hodgepodge of unenforceable commitments and promises. The Commission must now do the same.

Respectfully submitted,



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Dated: February 22, 2000

⁷³ DOJ Eval. at 2.

⁷⁴ DOJ Eval. at 27.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In the Matter of)	
)	
Application by SBC Communications Inc.,)	
Southwestern Bell Telephone Company, And)	CC Docket No. 00-04
Southwestern Bell Communications Services,)	
Inc., d/b/a Southwestern Bell Long Distance)	
For Provision of In-Region InterLATA)	
Services in Texas)	
<hr/>)	

**REPLY DECLARATION OF CHRISTOPHER V. GOODPASTOR
ON BEHALF OF COVAD COMMUNICATIONS COMPANY**

DECLARATION OF CHRISTOPHER V. GOODPASTOR

1. My name is Christopher V. Goodpastor. I am over 18 years of age and am competent to make this declaration. The statements in this declaration are true and correct.

2. I presently serve as Regional Counsel for Covad Communications Company. As Regional Counsel, I am responsible for legal and regulatory matters involving Covad in Texas, including negotiating interconnection agreements with incumbent local exchange carriers and representing Covad in regulatory proceedings. In particular, I am one of the attorneys responsible for representing Covad in its negotiation of an interconnection agreement with SWBT in Texas and in the interconnection agreement arbitration between Covad and SWBT before the Public Utility Commission of Texas. I previously executed a Declaration in this proceeding, CC Docket No. 00-4, which was attached to Covad's Opening Comments. The purpose of this Reply Declaration is to respond to comments raised by other parties in this proceeding, and to advise the Commission of several recent events with regard to SWBT and Covad in Texas in particular with regard to implementation of the Covad/Rhythms DSL Arbitration and interconnection negotiations between Covad and SWBT.

Summary

3. My reply declaration provides the following information:
- A summary of important recent and future events and milestones regarding the implementation of decisions by the Federal Communications Commission ("FCC") and the Public Utility Commission of Texas ("Texas PUC") relating to DSL services;
 - In response to the focus of some party comments (such as Rhythms and Sprint) on the unenforceability of SWBT's eleventh-hour "commitments"

made by SWBT to the Texas PUC, I discuss SWBT's continuing failure to implement those commitments with Covad.

**Several Aspects of Important Regulatory Decisions Regarding DSL
Are Scheduled for Implementation Within the Next Six Months**

4. Although witnesses for Southwestern Bell Telephone Company ("SWBT") attempt to rely on recent regulatory decisions to support SWBT's Application, SWBT has not yet implemented most of the significant rulings in these decisions. Several parties in this proceeding have argued that SWBT must fully implement these decisions before the Commission consider a 271 application from SWBT. The following is a summary of several important rulings relating to DSL services and their scheduled dates for implementation.

February 9, 2000: The deadline for SBC to dismantle its discriminatory Selective Feeder Separation ("SFS") system in Texas and elsewhere (FCC Order No. FCC 99-355). Although SBC has asserted that it has dismantled SFS, it has not provided any evidence that all discriminatory aspects of SFS—including the spectrum management system and the discriminatory loop reservation and assignment system—have been fully dismantled. Indeed, for loops longer than 12 kft., SWBT still requires Covad to endure the inefficient and cumbersome "reject/supplement" ordering system that SWBT originally designed to work with SFS;

February 17, 2000: The effective date of the FCC's UNE Remand Order. Covad and SWBT have not agreed on comprehensive terms and conditions to implement the terms of this order, many of which (such as remote terminal access) are absolutely essential to the provision of advanced services such as DSL;

February 18, 2000: The date on which Covad and SWBT filed the final version of their Interconnection Agreement with the Texas PUC. This Agreement contains, *inter alia*, terms for loop acceptance testing—a cooperative testing process that SWBT would not provide on all of Covad's loop orders until an effective interconnection agreement was in place. Attached to this Reply Declaration is a true and correct copy of the "DSL Attachment" to the Covad-SWBT Interconnection Agreement (Exhibit CGR-1). This DSL Attachment differs from the "T2A" DSL Attachment 25, and it also differs from the DSL Attachment

attached to my original Declaration in this proceeding (Exhibit CG-9). It is Covad's understanding that this Interconnection Agreement is now effective, pursuant to the Texas PUC's Order on February 4, 2000;

February 21, 2000: The deadline for parties to the DSL Arbitration in Texas to file proposed performance measurements for DSL. Covad hopes that this process will rectify the very serious and significant problems demonstrated by several CLECs and the Department of Justice with SWBT's current performance measurement system with regard to DSL. Covad hopes that the Texas PUC will act fast to make these clearly necessary changes so that complete, true and reliable data will be collected.;

March 1, 2000: The deadline for SWBT to file cost studies in support of its proposed rates for xDSL UNEs, loop conditioning, and ISDN UNEs that Covad uses to provide DSL services (Texas Arbitration Award at 110-11);

May 30, 2000: The deadline for SWBT to implement Datagate and EDI enhancements in Texas, including electronic pre-ordering of loop make-up information (Texas Arbitration Award at 110-11)

June 6, 2000: The deadline for SWBT to implement commercially operational line-sharing between SWBT and CLECs. (FCC Order FCC 99-355 ¶ 130.) Covad and SWBT have not agreed on comprehensive terms and conditions for line-sharing.

June 30, 2000: The deadline for SWBT to file costs studies in support of its proposed rates for access to actual loop make-up information (Texas Arbitration Award at 110-11);

July 30, 2000: The deadline for parties to file negotiated permanent rates and/or request arbitration on further issues (Texas Arbitration Award at 111).

5. SWBT's Application also relies on numerous commitments made by SWBT to the Texas PUC on December 15 and 16, 1999, just weeks before SWBT filed its 271 Application. Several parties, including Sprint and Rhythms, filed comments strongly stating that SWBT had not implemented these commitments and had no legally enforceable obligation to provide service pursuant to these commitments. The following

summary shows that, to the best of my understanding, SWBT has not yet implemented many of these commitments.

SWBT's December 1999 "Promises"	Status of Implementation on Feb. 22, 2000
SWBT will eliminate Selective Feeder Separation (SFS);	SWBT has not proved that it dismantled SFS; Legal Deadline to Implement (Feb. 9) has Passed
SWBT will streamline its ordering and pre-ordering processes to eliminate unnecessary requirements and delays;	For loops longer than 12 kft., SWBT still requires Covad to endure the same cumbersome and inefficient "reject/supplement" pre-ordering and ordering processes that it offered prior to making this "commitment";
SWBT will allow CLECs to manually request loop makeup information via email in addition to facsimile;	Implementation is unknown. Covad no longer submits orders by fax, having converted to LEX in January 2000;
SWBT will not use PSD masks as the basis for any loop qualification;	Covad still must provide PSD information to SWBT when placing an order; SWBT has not shown that it does not use this PSD information to qualify loops;
Acceptance Testing will be offered on a per loop basis to CLECs;	SWBT would not provide Acceptance Testing on a per loop basis absent an effective interconnection agreement that provided for such testing. Covad and SWBT finally filed this agreement on February 18, 2000. Pursuant to the Texas PUC's Order, Covad believes that this agreement becomes effective upon filing. No business day has occurred since that agreement was filed, so Covad does not know whether SWBT personnel will actually perform this testing on Covad's loop orders (or whether they will perform this testing correctly);
The percentage of CLEC orders that require conditioning will be compared with the percentage of SWBT orders that require conditioning;	SWBT has not provided Covad with any data comparing the frequency with which Covad and SWBT's retail ADSL operations receive loops requiring conditioning. Therefore, this commitment has not been implemented.

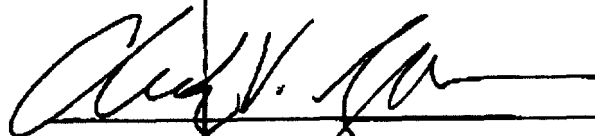
I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 22, 2000

Christopher V. Goodpastor

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 22, 2000


Christopher V. Goodpastor